

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWIN F. HALE, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL
for the Southern District of New York. } No. 340.

WILLIAM H. McALISTER, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL
for the Southern District of New York. } No. 341.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the appellee in the above-entitled causes, respectfully moves the court to advance the same on the docket on the following grounds:

The cases are in this court upon appeal from orders of the Circuit Court of the United States for the Southern District of New York, in the case of Hale discharging a writ of habeas corpus which had been allowed upon his petition, and in the case of McAlister denying the application for the writ.

The appellants, who are directors and officers of certain corporations engaged in the tobacco industry, were committed for contempt by the said court for failure to

answer certain questions propounded to them by the grand jury, and to produce certain papers before the grand jury which they were directed to produce by subpoenas *duces tecum* duly served upon them. The contempt was committed in the course of a proceeding then pending before the grand jury, under the so-called Sherman or anti-trust law (26 Stat., 209) and the acts amendatory thereof and supplementary thereto. Appellants appeared before the said grand jury, but refused to answer questions and produce papers upon the grounds, among others, that there was no legal warrant or authority for their examination, and that their answers might tend to criminate them. In their petitions for habeas corpus, appellants set forth the following grounds upon which they claimed that their detention was unlawful:

That the Circuit Court was without jurisdiction; that when the examination took place before the grand jury there was no cause or action pending in the said Circuit Court or before the grand jury between the United States and the American Tobacco Company, MacAndrews and Forbes Company, and the Imperial Tobacco Company as recited in the subpoenas *duces tecum*, in which appellants could be required to give evidence; that the grand jury was without jurisdiction, because no specific charge against any particular person was before them; that the act of February 25, 1903, granting immunity to witnesses testifying in a proceeding, suit, or prosecution under the anti-trust law, did not apply to appellants, because a hearing before a grand

jury was not, within the meaning of the anti-trust law, "such proceeding, suit, or prosecution;" that said act of February 25, 1903, is unconstitutional in that it undertakes to grant pardons to persons concerned in matters constituting violations of the laws of the United States, and in that it seeks to set aside the power of the States to punish offenses against their laws, thus being in violation of section 2, Article II of the Constitution, and the tenth amendment to the Constitution, and that the compulsory examination of appellants and the production of the papers called for by the subpœnas *duces tecum* would be in violation of the fourth and fifth amendments to the Constitution.

The determination of these objections is a matter of general public interest. The objections are novel, but may frequently be raised before Federal grand juries hereafter. The determination of the extent of the powers and the nature of the practice of Federal grand juries in all criminal cases, and the meaning and effect of the immunity law of February 25, 1903 (32 Stat., 854, 904), are to be settled by the decision of the court, and upon this decision will depend the question how effectively, under existing law, the provisions of the anti-trust law may be enforced. The proceeding out of which these appeals arose is of wide public interest and importance. It is based upon the violation of the anti-trust law by corporations having capital stock of many millions of dollars and controlling a great part of the tobacco industry. The officers of two of these corporations have, in this proceeding, refused, unless

compelled, to disclose material facts, and it is necessary, as soon as possible, to determine the rules of evidence upon which this and other proceedings of the kind must be conducted hereafter.

This is only one of a number of proceedings pending, at the instance of the United States Government, to punish or restrain violations of the anti-trust law, and it is a matter of common knowledge that similar questions have been raised in some of these proceedings.

An early determination of these matters by this court is important, for the reason that the proceeding out of which these cases arose, and other similar proceedings, in all of which the United States are concerned, can not be properly prosecuted until this court shall have decided the questions involved in the present cases.

Notice of this motion has been served upon opposing counsel, and proof of service thereof filed with the clerk.

HENRY M. HOYT,
Solicitor-General.